

NOT DESIGNATED FOR PUBLICATION

DIVISION I

**ARKANSAS COURT OF APPEALS**

No. CA07-643

PRO TRANSPORTATION, INC.,  
APPELLANT,

VS.

VOLVO TRUCKS NORTH AMERICA,  
INC., and VOLVO TRUCK CORP.,  
APPELLEES,

Opinion Delivered FEBRUARY 13, 2008

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT, SECOND  
DIVISION [NO. CV-03-5544]

HON. CHRISTOPHER PIAZZA, JUDGE,  
  
AFFIRMED

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**JOHN MAUZY PITTMAN, Chief Judge**

Appellant Pro Transportation, Inc. (Pro), brings this appeal<sup>1</sup> from a defense verdict in this product-liability case against appellees Volvo Trucks North America, Inc., and Volvo Truck Corp. (collectively, Volvo). On appeal, Pro challenges the circuit court's rulings excluding evidence, denying its motion for discovery sanctions, and denying its motion for new trial on the grounds that the verdict was clearly against the preponderance of the evidence and for juror misconduct. None of Pro's points have merit. Therefore, we affirm.

Pro is a long-haul trucking company based in Arkansas. Volvo designs and manufactures trucks and engines. Between 1999 and 2001, Volvo supplied Pro with a

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<sup>1</sup>This is the second appeal in this case. We dismissed the first appeal for lack of a final order. *Pro Transportation, Inc. v. Volvo Trucks North America, Inc.*, 96 Ark. App. 166, \_\_\_ S.W.3d \_\_\_ (2006).

number of trucks with model VED-12 C engines. Pro alleged that it had some issues with non-piston/liner components, *e.g.*, fuel injector cups, valves, turbo-chargers, and other components. After a period of negotiations, Pro and Volvo executed a confidential settlement and release (the “settlement/release”) on June 12, 2002. The settlement/release, which was filed under seal, called for the payment of a certain sum of money by Volvo and an extended service program on those components in exchange for Pro’s release of all claims, present and future.

On May 13, 2003, Pro filed suit against Volvo, alleging causes of action based on fraud, misrepresentation, negligence, breach of express warranty, breach of warranty of fitness for a particular purpose, and breach of warranty of merchantability.<sup>2</sup> The complaint alleged that, after execution of the settlement/release, Pro began experiencing problems caused by the piston/liner components, something not covered by the settlement/release and that Volvo knew of these problems and concealed them from Pro. The complaint alleged that these problems with the piston/liner components caused Pro to suffer lost profits due to increased repair time and costs, loss of value of the trucks, and increased driver costs. The complaint also sought a declaratory judgment that, based on Volvo’s concealment of the problems with the piston/liner components, the settlement/release was null and void. Volvo answered, denying the material allegations of the complaint.

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<sup>2</sup>Suit was originally filed against Volvo and another defendant, University Truck Center, Inc.; however, Pro dismissed all claims against University Truck Center prior to the case being submitted to the jury.

By order entered on November 1, 2004, the circuit court bifurcated the trial into two stages: first, whether Volvo procured the settlement/release by fraud and, second, the issue of liability and damages caused by the piston/liner failures. The ruling was based on our supreme court's decision in *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992), holding that it was an abuse of discretion to try products-liability claims with a claim for breach of a settlement contract involving settlement of the same products claims.

Prior to trial, Volvo filed a motion in limine seeking to exclude evidence of piston/liner failures in other, older models of the VED-12 engine because the VED-12 C engine had significant changes from the prior versions. The motion also sought to exclude evidence of other defects that were the subject of the settlement/release. After a hearing, the circuit court reserved ruling on the motion. In a written order filed on the first day of trial, the court prohibited Pro from introducing evidence of settlement negotiations or statements made during the negotiations of the settlement/release.

The case was tried to a jury January 10-21, 2005. The jury returned a verdict in favor of Volvo. Pro filed a timely motion for new trial, alleging that it was entitled to a new trial because the circuit court's ruling bifurcating the trial into two stages excluded evidence of problems with the non-piston/liner components; because the jury's verdict was against the preponderance of the evidence; and for misconduct by a juror during *voir dire*. The circuit court denied the motion. This appeal followed.

Pro raises four points for reversal: that the circuit court's exclusion of evidence relating to Pro's non-piston/liner component failures prevented Pro from proving causation

and denied it a fair trial; that the circuit court erred in denying Pro's renewed motion for sanctions and default judgment where the circuit court struck Volvo's defense based on the settlement/release; that the circuit court erred in denying Pro's motion for new trial because the verdict was clearly against the preponderance of the evidence; and that the circuit court erred in denying Pro's motion for a new trial based on juror misconduct.

In its first point, Pro argues that the circuit court erred in excluding evidence of non-piston/liner component failures and that this prevented Pro from proving causation. The admission of evidence is left to the sound discretion of the circuit court; on appeal, the circuit court's ruling will not be reversed absent a manifest abuse of discretion. *Metzgar v. Rodgers*, 83 Ark. App. 354, 128 S.W.3d 5 (2003).

Pro said that it was seeking to introduce evidence on the non-piston/liner component failures as evidence that all of the various engine failures caused Pro's financial losses. We find no error. Had the circuit court allowed Pro to present evidence of the non-piston/liner failures or the number of warranty claims, the jury could have been confused or misled into believing that Pro was seeking damages for those items (which had already been settled) as well as for the piston/liner failures.<sup>3</sup> Screening of relevant evidence is within the sound discretion of the circuit court and will be reversed on appeal only where there is a manifest abuse of discretion. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998). We find

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<sup>3</sup>The trial court at one point stated that it would grant Pro summary judgment on the issue of fraudulent release as a sanction for Volvo's failure to provide timely discovery; however, because this ruling was never reduced to judgment and does not appear in the order appealed from, we do not consider it in this analysis.

no such abuse of discretion in this case.

Pro's second point is that the circuit court erred in denying its renewed motion for sanctions and default judgment where the circuit court struck Volvo's settlement/release defense. The imposition of sanctions for failure to provide discovery rests in the circuit court's discretion. *Coulson Oil Co., Inc. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003).

Pro argues that the circuit court's ruling bifurcating the case had the effect of preventing it from presenting all of the evidence and that, because Volvo did not comply with the circuit court's discovery orders, the court should have sanctioned Volvo by entry of a default judgment as to liability. The supreme court has said that "[t]his extraordinary remedy should be used sparingly and only when other measures fail because of the inherent danger of prejudice." *Harper v. Wheatley Implement Co.*, 278 Ark. 27, 33, 643 S.W.2d 537, 539 (1982); *see also Rodgers v. McRaven's Cherry Pickers, Inc.*, 302 Ark. 140, 788 S.W.2d 227 (1990). In denying the motion, the circuit court found that the discovery violations in the present case were nothing on the order of those found in *Rush v. Fieldcrest Cannon, Inc.*, 326 Ark. 849, 934 S.W.2d 512 (1996). The discovery at issue in the present case, the Ricardo reports, were ultimately turned over to Pro and they were used at trial. Granted, as the circuit court discussed, Pro was unable to conduct further discovery based on the reports. However, because the circuit court was in a superior position to judge the actions or motives of the litigants, we will defer to its ruling. *See Calandro v. Parkerson*, 333 Ark. 603, 970 S.W.2d 796 (1998).

In its third point, Pro asserts that the circuit court erred in denying its motion for a

new trial because the jury's verdict was clearly against the preponderance of the evidence. When a motion for a new trial is made on the ground that the verdict is clearly contrary to the preponderance of the evidence, we will affirm the denial of the motion if the jury's verdict is supported by substantial evidence. *Barringer v. Hall*, 89 Ark. App. 293, 202 S.W.3d 568 (2005). We hold that there was substantial evidence to support the verdict. There was evidence that Pro was using a synthetic motor oil in its trucks and sometimes went 75,000 miles or more between oil changes despite the recommendation of Volvo engineers that synthetic oils be changed every 25,000 miles. Volvo engineers also testified that Pro accounted for 45% of Volvo's warranty claims, leading them to conclude that the piston/liner failures Pro experienced were the result of improper maintenance by Pro. This conclusion is supported by the testimony of Pro's former director of maintenance, who testified concerning problems with Pro's maintenance program, such as not properly maintaining the coolant systems and excessive intervals between oil changes. We hold that the jury could reasonably have found that Pro's piston/liner failures were the result of its poor maintenance program rather than any defect with the engines themselves.

For its fourth point for reversal, Pro argues that the circuit court erred in failing to grant a new trial on the basis of juror misconduct. Jury misconduct is a basis for granting a new trial under Ark. R. Civ. P. 59(a)(2). *See Dodson v. Allstate Insurance Co.*, 345 Ark. 430, 47 S.W.3d 866 (2001). The decision whether to grant a new trial is discretionary with the circuit court, which will not be reversed absent an abuse of that discretion. *Id.* The burden of proof in establishing jury misconduct is on the moving party. *Id.* The moving

party must show that the alleged misconduct prejudiced his chances for a fair trial and that he was unaware of this bias until after trial. *Id.*

During *voir dire*, counsel for both parties read the names of their witnesses and the circuit court asked the prospective jurors whether they knew any of the attorneys or representatives of the parties or did business with any of the parties. There was no response. After questioning by counsel for Pro, counsel for Volvo asked whether any of the prospective jurors read *Arkansas Business*. One juror responded that she did, adding that she worked for the Internal Revenue Service (IRS), that she was aware that the IRS was investigating Pro, and that she was aware of Pro's financial situation.

On appeal, Pro does not specify what it considers to have been jury misconduct in this case. If Pro is suggesting that the juror's disclosure of the IRS investigation was prejudicial, that objection was not made at trial and we therefore cannot address it. The circuit court, at Pro's request, did ask the juror whether the IRS investigation was civil or criminal. She responded that it was a civil investigation, whereupon counsel for Pro stated that it was not concerned and did not seek disqualification. Therefore, Pro received all of the relief it requested and cannot show prejudice from the juror's failure to answer its questions on *voir dire*.

Affirmed.

GLADWIN and BAKER, JJ., agree.